No. 89-1671

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CITY OF COLUMBIA and COLUMBIA OUTDOOR ADVERTISING, INC.,
Petitioners,

v.

OMNI OUTDOOR ADVERTISING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether there is a "co-conspirator" exception to state action immunity under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), based on the subjective motivations of local government officials.

2. Whether allegations of a sham or a conspiracy may defeat a private party's immunity from antitrust liability when it simply engaged in lawful methods of lobbying for municipal legislation.

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling

interest in the issues presented here: whether exceptions should be created to the state action and *Noerr-Pennington* doctrines that respectively shield from antitrust liability state and local governments and persons who petition those governments for legislative action.

In this case, the court of appeals fashioned exceptions to these doctrines that permit antitrust actions to proceed when municipal officials are alleged to have conspired with private parties to enact anticompetitive legislation that benefits those parties. This holding has profound consequences for local governments. It will permit losers in the legislative arena to assert antitrust claims in virtually every case where competing private interests sought—or supported—ordinances that have some anticompetitive effect. It will make suspect virtually all lobbying, and may call into question all attempts by private parties to inform local government decisionmaking. And it accordingly may discourage the sort of communication between legislators and affected citizens that is essential for effective government. For these reasons, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt petitioners' statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress and this Court have long recognized the interdependence between the political liberty enshrined in our Constitution and the economic liberty mandated by federal antitrust laws. Cognizant of this interdependence, the Court has developed immunity doctrines to ensure the coexistence of federal antitrust laws with two notable fixtures on our democratic landscape. The state

[1] The parties' letters of consent pursuant to Rule 37 of the Rules of this Court have been filed with the Clerk of the Court.

action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), preserves the right of States to regulate their own economies. The *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) ensures that States will have the information necessary to exercise this function by protecting constituents' rights to petition for such regulations, regardless of their motives.

The court below purported to be sensitive to the interdependence between our political and economic liberties, claiming only to draw a narrow exception to the state action immunity doctrine for cases in which the municipality may be labelled a "co-conspirator." But such a narrow exception would swallow the rule. The vagaries of a conspiracy notion in the legislative context would render it impossible for federal courts to draw the necessary line between legitimate lobbying and conspiratorial conduct. Losing lobbyists always may be expected to challenge economic regulations on antitrust grounds. The result would be an enormous volume of litigation that, by dissecting the motives of local governments and their constituents, would weaken our federalist structure, stifle free speech, and limit the ability of the people to petition their governments.

Here, it is conceded that the City satisfies the requirements for immunity under the state action doctrine; its conduct therefore must be treated as that of the State. In such circumstances, respondent cannot prevail simply by arguing that the City had an anticompetitive motive. To the contrary, the very purpose of the state action doctrine is to *preserve* anticompetitive state conduct. Indeed, the Court has made clear that, while private anticompetitive activity is inherently suspect, politically accountable governmental bodies are presumed to act in the public interest. And in the absence of conduct on the part of government officials that the State has placed beyond the

pale, such as bribery or other corruption—conduct that is not present in this case—that presumption of regularity should not be set aside.

Similarly, there is no reason here to apply a "sham" or conspiracy exception to the *Noerr-Pennington* doctrine. The lobbying here was not a sham; to the contrary, respondent's complaint is that it was too effective. And again, absent independent illegality on the part of the private defendant (in the form of bribery or similar conduct), it is impossible to see why the First Amendment principles that underlie *Noerr-Pennington* immunity are obviated by a lobbyist's success at persuasion.

ARGUMENT

I. STATE ACTION IMMUNITY PROTECTS THE CITY OF COLUMBIA'S ORDINANCES FROM INJUNCTION UNDER THE SHERMAN ACT.

In its development of the state action immunity doctrine under *Parker v. Brown*, 317 U.S. 341 (1943), this Court reconciled two congressional purposes. While Congress intended that the Sherman Act, 15 U.S.C. §§ 1-7, not nullify state regulation, it also sought to preclude States from immunizing the private, anticompetitive conduct prohibited by the Act. Consistent with these intentions and sensitive to federalism concerns, this Court has enunciated standards to immunize true state regulation while punishing private violations of the Act. In cases involving municipal regulation, this Court has required that the actions of local government be taken pursuant to a clearly articulated state policy to displace competition. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985).

Respondent's arguments would upset this carefully struck balance. Although respondent claims only to seek a narrow exception for cases in which the municipality may be labelled a "co-conspirator," such an exception is precluded by the state action doctrine itself. States,

under *Parker*, simply are not within the substantive reach of antitrust laws. Local governments, as the States' agents, share this immunity, so long as they satisfy the *Town of Hallie* standard.

In place of this straightforward application of *Parker* and *Town of Hallie*, the court of appeals posits an extraordinary—and extraordinarily peculiar—reading of the antitrust laws. *Parker* and its progeny make clear that Congress, in enacting those laws, chose not to subject state conduct to antitrust scrutiny. This is an immunity that turns on the identity of the actor, and is premised on the conclusion that Congress did not want to displace legitimate state activity. The court of appeals acknowledged all this. It appeared to believe, however, that Congress, having exempted States (and duly authorized municipalities) from the reach of the antitrust laws, then implicitly chose to subject them to liability if their facially valid legislative acts were "improperly" motivated. This exception is wholly unrelated to the premises on which Congress grounded the state action doctrine; it also would impose a federal oversight of the state legislative process that is virtually unique. Not surprisingly, there is no evidence whatsoever that Congress actually intended to enact such a regime.

A. *Parker* And *Town of Hallie* Protect The City's Ordinances Because They Are Legislatively Authorized.

In *Parker*, this Court held that the Sherman Act does not reach restraints of trade "imposed . . . as an act of government" by a sovereign State. 317 U.S. at 352. *Parker* rests on an understanding of congressional intent that is informed by federalism principles. In enacting the Sherman Act, Congress did not intend to nullify the right of the people, speaking through their elected state and local representatives, to regulate their economies. The Court found "nothing in the language of the Sherman Act or in its history which suggests that its

purpose was to restrain a state or its officers or agents from activities directed by its legislature" (*id.* at 350-351), adding that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351. Thus, "under the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-568 (1984).[2]

Because state action immunity follows from the congressional intent to preserve the regulatory role of States, the Court has required that "to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Town of Hallie*, 471 U.S. at 38-39, citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978). But the Court has interpreted this requirement in a manner that is sensitive to the federalism principles that Congress embraced in the anti-

[2] The Court's unwillingness to apply the Sherman Act to state regulation is consistent with its other preemption case law. Grounded in the Supremacy Clause, preemption treads on the very sensitive area of federal-state relations, and thus this Court has been "reluctant to infer preemption." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). Instead, the presumption is that preemption is not to be found absent "the clear and manifest purpose of Congress" that the federal act should supersede the police powers of the States. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Sherman Act contains no such "clear and manifest" intent to preempt—in fact this Court has repeatedly "found in the Sherman Act no purpose to nullify state powers." *California Retail Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980), citing *Parker*, 317 U.S. at 352 (emphasis added).

trust laws. A local government "need not 'be able to point to a specific, detailed legislative authorization'" for its challenged conduct. *Town of Hallie*, 471 U.S. at 39, citing *Lafayette*, 435 U.S. at 415 (opinion of Brennan, J.). Instead, economic policy will be deemed to be "clearly articulated" when a state legislature manifests an intention to impose economic regulation upon an identified area of business behavior. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).[3]

The Fourth Circuit held (Pet. App. 7a-9a) that South Carolina laws authorizing local zoning regulation sufficiently authorized the City's billboard ordinances under *Town of Hallie*. See Pet. App. 7a n.2, quoting S.C. Code Ann. §§ 5-23-10, 5-23-20; *id.* § 6-7-10.[4] And the restriction of competition is a foreseeable result of empowering the City with this zoning authority. See *Town of Hallie*, 471 U.S. at 42; *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir.), cert. denied, 109 S.Ct. 489 (1988). That should have been the end of the court of appeals' inquiry.

[3] For local government immunity, active supervision by the State is not required. *Town of Hallie*, 471 U.S. at 46-47. Nor must the State intend that the local regulation have an anticompetitive effect. *Id.* at 43. Finally, the local regulation need not be enacted pursuant to state compulsion. *Id.* at 45-46.

[4] It bears repeating that "zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1976) (Powell, J., concurring) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). In pursuit of these goals, local governments around the country have enacted ordinances to limit billboards or other business activities, pursuant to general authorizations similar to South Carolina's. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion). To find that the ordinances here do not merit *Town of Hallie* protection would imperil countless other zoning ordinances.

B. Respondent's Conspiracy Allegations Do Not Defeat The City's State Action Immunity.

1. Under this Court's analysis in *Town of Hallie*, state action immunity protects the City of Columbia's ordinances from injunction under the Sherman Act because they were enacted pursuant to a clearly articulated state policy to displace competition. Nothing more need be shown. The court of appeals nevertheless concluded that it should enjoin the City from enforcing those ordinances because the City was a "co-conspirator" in a scheme to restrain trade. But *Town of Hallie*'s objective, process-oriented test precludes a subjective analysis that effectively would extend the antitrust laws to reach the conduct of defendants that otherwise is not covered by the Sherman Act.

Indeed, this Court explicitly rejected such a co-conspirator exception to state action immunity in *Hoover v. Ronwin*. The Court there said that *Parker*

> unmistakably hold[s] that, where the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action. . . . The reasoning adopted by the dissent would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine. . . . A party dissatisfied with the new law could circumvent the state-action doctrine by alleging . . . an undisclosed collective desire to restrain trade. . . . The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.

Hoover, 466 U.S. at 579-580. A co-conspirator exception would entail the same emasculation of *Town of Hallie* that the Court perceived in *Hoover*.

The court of appeals' rejection of this conclusion is premised on a misunderstanding of the state action doctrine. The court's holding was grounded on the assumption that, if the doctrine excludes a conspiracy exception, "the Supreme Court in post-*Parker* decisions would have given municipalities the same blanket protection it had awarded states in *Parker*." Pet. App. 12a. But as this Court has several times explained, "[m]unicipalities . . . are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie*, 471 U.S. at 38. In contrast, when municipalities act pursuant to state authorization, they do so as state agents; by validating state-authorized anticompetitive acts taken by local governments, the state action doctrine "preserv[es] to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.* at 39, quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 415-416 (opinion of Brennan, J.).

The Court accordingly has declined to give "municipalities the same blanket protection" accorded States (Pet. App. 12a), not to preserve a conspiracy exception, but simply because unauthorized municipal action is not the action of the State. When the *Town of Hallie* requirements are satisfied, however—as they concededly are in this case—"a municipality *is* an arm of the State." *Town of Hallie*, 471 U.S. at 45 (emphasis added). And granted satisfaction of those requirements, there is nothing in this Court's decisions that justifies the distinction upon which the court below premised its holding.

To the contrary, the court of appeals' analysis is inconsistent with the political theory—and the understanding of behavior—upon which Congress and this Court premised state action immunity. A private party, of course, "may be presumed to be acting primarily on his

or its own behalf." *Town of Hallie*, 471 U.S. at 45-46. As a consequence, "'[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick v. Burget*, 108 S.Ct. 1658, 1663 (1988), quoting *Town of Hallie*, 471 U.S. at 47. See also, *e.g.*, *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 725-726 (1987). Private anticompetitive conduct therefore is inherently suspect. But where a politically accountable governmental body is responsible for the restriction at issue, "[w]e may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Town of Hallie*, 471 U.S. at 45 (footnote omitted).

> In our economic system, private business enterprises are presumed to respond predominately, if not exclusively, to the profit motive. By contrast the concept of "profit" *per se* is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law—the private desire to reap extra-normal profits versus the public interest in free competition—will not appear in its traditional form when the accused antitrust conspirator is a governmental entity.

Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1571-1572 (5th Cir. 1984) (en banc), cert. denied, 474 U.S. 1053 (1986). If public officials misjudge the public interest, the public has an immediate remedy at the polls.

It is no answer to this to suggest, as did the court of appeals, that state or municipal action is not in the public interest when it relates "solely to forcing competitors from a particular market" or is otherwise anticompetitive. Pet. App. 12a; see *id.* at 9a. The very point of the state action doctrine, after all, is to *save* anticompetitive governmental action; by definition, the doctrine comes into play only when state (or authorized local) governmental activity otherwise would violate the Sherman Act.

See *Fisher v. Berkeley*, 475 U.S. 260, 265 (1986). The doctrine accordingly is premised on the understanding that States and authorized local governments) may displace competition when that is thought to be in the public interest. This may mean that States favor one industry over another or, on occasion, one firm over another. But at least so long as the political process is not distorted by objectively illegal acts such as bribery—a possibility we discuss below—the theory of the state action doctrine precludes a challenge predicated solely on a statute's anticompetitive effect or purpose.

That this is so comes clear from the elements of congressional intent that underlie the *Parker* doctrine. This Court has repeatedly "found in the Sherman Act *no* purpose to nullify state powers." *Midcal*, 445 U.S. at 104, citing *Parker*, 317 U.S. at 352 (emphasis added). Respondent's co-conspirator doctrine would be an exception to this exception. Such convoluted statutory construction would make a mockery of *Parker*'s canon that "an unexpressed purpose to nullify a state's control over its officers *and agents* is not lightly to be inferred." *Parker*, 317 U.S. at 351 (emphasis added).

2. The wisdom of the *Parker* rule is evident. Every legislative decision produces winners and losers, and government could not function if the losers in the legislative process were permitted to use litigation to cure their grievances. In such a system, local governments would have to bear "the substantial 'discovery and litigation burdens' attendant particularly upon refuting a charge of improper motive." *Hoover*, 466 U.S. at 580-581 n.34.

This ongoing judicial supervision would have detrimental effects upon the autonomy of local government units and their authority to govern themselves. Even if the distraction of burdensome federal judicial review could be reconciled with federalism concerns, the intrusiveness could not. Inquiries into legislative motive "are

a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . What motivates one legislator . . . is not necessarily what motivates scores of others to enact [legislation], and the stakes are sufficiently high for us to eschew guesswork." *Id.* at 383-384. Indeed, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986), rejected a dissection of legislators' motives in the specific context of the enactment of a zoning ordinance that limited the locations of adult motion picture theaters. In light of the Court's vigilant role in guarding First Amendment rights, the decision to limit its inquiry in *Renton* is especially telling. Surely, if federal courts are prohibited from searching for legislative motives to restrain the marketplace of ideas, those courts must be equally limited in policing the economic marketplace, where their standard of review has been more deferential.[5]

In fact, respondent's co-conspirator exception might entail a complete abandonment of that historically deferential role. A conspiracy exception would force local governments to disprove allegations of improper motivation by demonstrating that they had enacted the challenged regulations for pro-competitive or public welfare reasons. The review of such motivations would return federal courts to a substantive review of economic

[5] The only exception to this Court's refusal to invalidate statutes on the basis of motive is the "very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose." *United States v. O'Brien*, 391 U.S. at 383 n.30 (bill of attainder). See *Edwards v. Aguillard*, 107 S.Ct. 2573, 2578-2583 (1987) (secular purpose); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264, 268 n.18 (1977) (race-based motivation).

regulation—a role that this Court rejected in *Parker*. It is a role, moreover, that the courts are ill-equipped to fill, for "[t]here is simply no way to tell if the state has 'looked' hard enough at the data." P. Areeda & D. Turner, *Antitrust Law* ¶ 213c, at 75 (1978).[6]

Finally, a co-conspirator exception would impermissibly inject federal courts into monitoring the relationship between a State and its local governments. Yet the Court implicitly rejected such an approach in *Town of Hallie*, viewing the requirement of active supervision that is imposed on private anticompetitive conduct as too intrusive to impose on municipalities. And the requirement rejected in *Town of Hallie* appears deferential when compared to the paternalism involved in a federal court's trying to discern whether a local government has acted for the State's public good. Such an approach, as the Court indicated in a similar context, "would interfere significantly with a State's ability to structure relations exclusively with its own citizens. . . . A healthy regard for federalism and good government renders us reluctant to risk these results." *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980).[7]

[6] A conspiracy exception to state action immunity would also present local elected officials with the difficult choice between facing federal antitrust liability if they respond to their constituents or being voted out of office if they do not.

[7] This Court has also refused to carve out a conspiracy exception for cases involving state delegation to private parties. In *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), the Court upheld a California regulation permitting established automobile dealers to delay substantially the establishment of competing franchises in their geographic markets, despite arguments that the regulation represented nothing more than the success of the car dealers in lobbying the state legislature for a special anticompetitive benefit. *Id.* at 115, 120 (Stevens, J., dissenting). This Court has instead recognized and addressed the lack of a direct political check in cases of delegation to private parties by requiring, in addition to a clearly articulated state policy, active state supervision of the private conduct. The rejection of a conspiracy excep-

3. Fortunately, a conspiracy exception to antitrust preemption is as unnecessary as it is dangerous. When "the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing agreement." *Town of Hallie*, 471 U.S. at 47. "[M]unicipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct." *Id.* at 45 n.9. Most States have sunshine laws or other mandatory disclosure laws such as freedom of information or financial disclosure acts that guard against municipal conspiracies. Local governments generally must comply with strict bidding and procurement requirements established under state law. Most important, public officials are ultimately accountable to the public through the electoral process. Such a position in the public eye should provide "some greater protection against antitrust abuses than exists for private parties." *Ibid.*[8]

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tion even in cases involving delegation to private parties precludes recognizing such an exception in cases involving the conduct of local governments where a more deferential standard applies.

[8] In addition to these safeguards, federal law also deters and punishes abuses of the government process. Local governments are no strangers to litigation under 42 U.S.C. § 1983. In fact, many of the antitrust cases that have been brought against local governments include Section 1983 claims, resulting in even more convoluted litigation. See, *e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 520 F. Supp. 191 (C.D. Cal. 1981), rev'd, 686 F.2d 758 (9th Cir. 1982), cert. denied, 459 U.S. 1105 (1983), on remand, 563 F. Supp. 169, aff'd, 726 F.2d 1430 (9th Cir. 1984), cert. denied, 471 U.S. 1003 (1985); *Lasalle National Bank v. Lake County*, 579 F. Supp. 8 (N.D. Ill. 1984). Federal funds may be recovered from local government grantees when the funds have been misspent. *Bell v. New Jersey*, 461 U.S. 773 (1983). The provisions of the federal bribery statute, 18 U.S.C. § 201, may also be applied to local government officials and their grantees. Finally, provisions of the Robinson-Patman Act, 15 U.S.C. §§ 13(a) and 13(f), have been applied to commercially motivated retail transactions by state and local governments. *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150 (1983).

Against the Court's holding in *Hoover* that rejected a conspiracy exception, respondent offered dicta from *Parker*, or more accurately, dicta misunderstood. This dicta did not carry the day in *Hoover* and should not do so here. Moreover, each phrase culled from *Parker* is followed by a citation to cases that either are inconsistent with a conspiracy exception or are easily distinguishable from this case because they struck down state delegations of regulatory power to financially interested private parties, not to local governments checked by the political process.

The first supposed basis for a conspiracy exception is *Parker*'s dictum that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*." *Parker*, 317 U.S. at 351. But in *Northern Securities*, 193 U.S. 197, 332, 334-347 (1904), the Court simply held that a decision to enjoin a combination of stockholders did not invade the reserved rights of the States that had created the corporations.

Second, the *Parker* Court noted that it faced "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*." *Parker*, 317 U.S. at 351-352. *Union Pacific*, however, involved an arrangement in which a private party took a leading and dominant part in administering the restraint of trade without anything approaching active supervision by any state or local government. See *Union Pacific R. Co. v. United States*, 313 U.S. 450, 467 (1941).

The final supposed basis (see Pet. App. 10a) for a co-conspirator exception is the Court's suggestion in *Parker* that "the state in adopting and enforcing the . . . program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly

but, as a sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Parker*, 317 U.S. at 352, citing *Olsen v. Smith*, 195 U.S. 332, 345 (1904), and *Lowenstein v. Evans*, 69 F. 908, 910 (1895). Yet, *Olsen* and *Lowenstein* confirm *Parker*'s holding that the exercise of regulatory power by the State is, by definition, an exercise of sovereignty, and therefore cannot be a restraint of trade. The *Olsen* Court stated that, "if the State has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." 195 U.S. at 345. In *Lowenstein*, the circuit court found that the "act of the legislature of South Carolina evidently does not create in nor give to any *individuals* the monopoly. . . . [B]y this act the state makes no contract, enters into no combination or conspiracy." 69 F. at 910 (emphasis added).

Subsequent case law that supposedly supports a conpiracy exception similarly involved the delegation of regulatory authority to financially interested private individuals. For example, in *Midcal* the Court stated that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S. at 106. The statute at issue in *Midcal* authorized a private party—a wine producer—to compel a second private party—a wholesaler—to enter into an agreement fixing resale prices. It is precisely this element of private concerted action that is wholly lacking in this case.

We should add that this is not a case where an exception to state action immunity may be premised on

corruption or illegality on the part of government actors. It is not at all clear that such an exception is appropriate under the antitrust laws; while "[n]obody condones fraud, bribery, or misrepresentation in any form . . . other state and federal laws ensure that such conduct is punishable." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S.Ct. 1931, 1944 (1988) (White, J., dissenting). But in any event, conduct that does not run afoul of bribery or other laws necessarily is legitimate, and legislation that is a product of lobbying or similar activities that the State has deemed lawful cannot be distinguished from other state action on that ground.

Here, there was no corruption. The jury charge in this case did not tie liability to a finding of bribery or other independently illicit conduct. See Pet. App. 39a-40a (Wilkins, J., dissenting). And the record is, in any event, insufficient to support a finding of objectively corrupt acts. Respondent failed to prove that any of the City Council members acted with bad faith.[9] Instead, respondent relied either on its own subjective perceptions,[10] the existence of COA's wholly licit personal relationships

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[9] "At no time did COA employees threaten anyone or use otherwise coercive tactics. No one engaged in deception or misrepresentation to secure passage of the billboard ordinances. There was no evidence of any illegal conduct such as bribery, coercion, violence, kickbacks, or the like. Neither the Mayor nor the City Council members stood to gain any personal financial advantage by passing the billboard ordinances nor was there any evidence of any other selfish or otherwise corrupt motive." Pet. App. 39a (Wilkins, J., dissenting).

[10] The subjective perceptions include respondent's claim that the Mayor and members of the City Council were less cordial to its representatives than to COA's and its emphasis on a COA official's puffing about his influence with the local government. Pet. App. 13a-17a; *id.* at 38a (Wilkins, J., dissenting). Rudeness and puffery are not touchstones of antitrust liability.

with City Council members,[11] or COA's use of other legitimate aspects of our political system.[12] These facts are not sufficient to strip defendants of antitrust immunity. If there ever is a need to stretch antitrust laws to reach overt, corrupt acts, this is surely not the case.

In short, state action immunity, as an expression of the substantitve limits on the reach of the antitrust laws, can admit of no conspiracy exception. Even if it were not logically precluded, such an exception would severely threaten the principles of federalism that form the foundation for the doctrine. It is not a proper role for federal courts to decide whether an interested party, simply through its lobbying efforts, has exerted too much influence upon the enactment of legislation.

II. THE *NOERR-PENNINGTON* DOCTRINE IMMUNIZES COA'S CONDUCT FROM ANTITRUST LIABILITY.

Under the *Noerr-Pennington* doctrine, a private party may not be held liable under antitrust laws for seeking to persuade government officials to take a particular action. In the court of appeals, respondent contended that COA was not entitled to *Noerr-Pennington* immunity because COA's activities allegedly fell within the "sham" exception or, alternatively, within a new "co-conspirator" exception to the *Noerr-Pennington* doctrine. The court of appeals agreed with respondent that COA's actions were a sham and therefore found it unnecessary to consider the validity or applicability of any co-conspirator exception.

Neither of these exceptions applies. The evidence that appeared to trouble the Fourth Circuit does not support, indeed is not even pertinent to, application of the sham exception. Moreover, there is, and ought to be, no co-conspirator exception to the *Noerr-Pennington* doctrine. To subject lobbying activity to antitrust liability under the standard embraced by the court below would deprive state and local governments of a valuable and necessary source of information, and would entangle such public bodies in wasteful and distracting litigation.

[11] Respondent repeatedly relied on the friendship between COA's owner and the Mayor. Pet. App. 38a-39a, 43a (Wilkins, J., dissenting). Friendship is also not a touchstone of antitrust liability.

[12] Respondent relied on lobbying efforts and campaign contributions made long before or after this case began. Pet. App. 38a-39a (Wilkins, J., dissenting).

A. COA Lobbied For A Governmental, As Opposed To A Private, Action.

In *Noerr*, this Court held "that no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. To hold otherwise, this Court explained, "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Id.* at 137. The Court declined to do this in *Noerr* because of the substantial First Amendment rights at issue: "That right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

The court below overlooked this fundamental consideration. Like the publicity campaign in *Noerr*, and unlike the situation in *Allied Tube*, 108 S.Ct. at 1939, the activity at issue here took place "in the open political arena, where partisanship is the hallmark of decision-making." *Id.* at 1940. "'[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Id.* at 1936, citing *Noerr*, 365 U.S. at 136.[13] Thus, since the "restraint of trade," if any, resulted from the City of

[13] The Court in *Allied Tube* repeatedly emphasized the importance of the "private" context. See, *e.g.*, 108 S.Ct. at 1937 ("The rele-

Columbia's ordinances, *Noerr-Pennington* immunizes COA from liability for any damages resulting from that ordinance.[14]

B. COA's Lobbying Activities Were No Sham.

In holding COA liable under the Sherman Act, the Fourth Circuit determined that COA's actions fell within the sham exception to the *Noerr-Pennington* doctrine. The Fourth Circuit relied on certain evidence allegedly establishing the anticompetitive goals of COA's lobbying activities and the purported denial to respondent of meaningful access to the City's decisionmaking process. In so doing, the court below stretched the sham exception well beyond its recognized limits.

Whatever may be said of COA's actions, they plainly were not a sham. In the typical sham case, a private party pursues baseless claims with no realistic expectation of winning a favorable governmental response but in the hope that the claims will provide a competitive benefit. See P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203.1a, at 13-14 (Supp. 1988). Fairly considered, respondent's essential claim is precisely the opposite—not that COA's lobbying was a pretext, but that the lobbying was, in fact, too successful.

This Court recently considered the proper reach of the sham exception in *Allied Tube*. There, the Court squarely rejected the notion that the sham exception ap-

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vant context is thus the standard-setting process of a private association."); *ibid.* ("[W]hatever *de facto* authority the Association enjoys, no official authority has been conferred on it by any government.").

[14] Respondent's apparent effort in this Court (see Br. in Opp. at 5) to tie its claim in part to actions of COA unrelated to lobbying for the ordinances is contrary to the court of appeals' understanding of respondent's case. See Pet. App. 33a.

plies to "the activity of a defendant 'who genuinely seeks to achieve his governmental result, but does so *through improper means*.'" 108 S.Ct. at 1941 n.10 (citation omitted). "Such a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action." *Allied Tube*, 108 S.Ct. at 1941 n.10. As in *Allied Tube*, "[t]he effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the [legislation]." *Id.* at 1938. *Allied Tube* teaches that the sham exception applies only when lobbying is intended not to influence the government, but to injure a competitor directly.

Indeed, COA's anticompetitive motivation is utterly irrelevant to *Noerr-Pennington* immunity. The *Noerr* Court unanimously held that lobbying is beyond the reach of the Sherman Act, even where its "sole purpose" is to destroy competitors. 365 U.S. at 138. "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Id.* at 139. The Court relied not only on the First Amendment and congressional intent, but also on state and local governments' need for such information: people with "a hope of personal advantage . . . provide much of the information upon which governments must act." *Ibid.*

Respondent also claims that COA's efforts here were not genuine, or were aimed at delay, simply because a state court subsequently invalidated the ordinance that COA favored. But the right to petition "would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand constitutional challenge." *Subscription Television, Inc. v. Southern California Theatre Owners Ass'n*, 576 F.2d 230, 233 (9th Cir. 1978). In fact, a lower fed-

eral court had upheld a moratorium similar to that of the City of Columbia, supporting the genuineness of the COA's lobbying for an appeal. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 45-46, 47 n.10 (1982).

The Fourth Circuit supported its extension of the sham exception by referring to a line of cases involving private restraints only incidentally related to governmental action. These cases stand solely for the proposition that such agreements in restraint of trade do not become protected simply because they may eventually be reviewed or ratified by a government agency. See *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 778-779 (1990) (horizontal price-fixing arrangements not immunized merely because they are linked to efforts to induce public officials to act in certain way); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945) (horizontal price agreements not protected merely because competitors wished to propose that price as appropriate level for governmental ratemaking). Thus, COA's genuine lobbying for governmental action does not fall within *Noerr's* sham exception. To hold otherwise would render "sham no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube*, 108 S.Ct. at 1941 n.10.

C. Respondent's Conspiracy Allegations Do Not Defeat COA's *Noerr-Pennington* Immunity.

Although the court below did not address respondent's argument that a "conspiracy" exception exists to *Noerr-Pennington* immunity, its expansion of the sham exception, and emphasis on the alleged conspiracy between COA and City officials, effectively created the exception sought by respondent. As with a conspiracy exception to *Parker* immunity, a conspiracy exception to the *Noerr-Pennington* doctrine would be inappropriate, unnecessary, and dangerous. This Court has rejected attempts to

transform the Sherman Act into a political code of conduct.

> Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity. . . . The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involved conduct that can be termed unethical.

Noerr, 365 U.S. at 140-141.[18] As the Seventh Circuit has observed, "[n]othing in the *Noerr* opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts." *Metro Cable Co. v. CATV of Rockford*, 516 F.2d 220, 230 (7th Cir. 1975).

Metro Cable involved allegations strikingly similar to respondent's charges. The losing cable company asserted that two members of the public persuaded the defendant Mayor and Alderman to support the CATV application "in exchange" for campaign contributions. The Seventh Circuit found such allegations insufficient to abrogate *Noerr-Pennington* immunity: "A holding that participation by members of the legislative body to the extent al-

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[18] The *Noerr* Court unanimously held that lobbying is beyond the reach of the Sherman Act, even when defendants deceptively promoted their own lobbying efforts as those of ostensibly neutral third parties. 365 U.S. at 141.

leged here . . . would . . . be tantamount to outlawing all such campaigns." 516 F.2d at 230. In short, a conspiracy exception would "in practice abrogate the *Noerr* doctrine. It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . 'co-conspirators.'" *Ibid.*

Respondent's proposed conspiracy exception also, once again, ignores the irrelevance of anticompetitive motivation to *Noerr-Pennington* protection. The right to endeavor to influence governmental action includes the right to do so out of self-interested, and even blatantly anticompetitive, motives. This Court has never insisted that political rights be exercised "without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare." *Brown v. Hartlage*, 456 U.S. 45, 56 (1982); *id.* at 56 n.7 (citing *The Federalist* No. 10 (J. Madison)).

This Court has not used Sherman Act liability as a political litmus test because no workable boundary exists between a "conspiracy" and legitimate lobbying. And in the First Amendment context, vague lines chill speech. Although the City of Columbia may have been able to enact its billboard ordinances without the assistance of COA, the prospect of treble damages would surely silence future constituents with essential information.

State and local governments have an acute interest in preserving the *Noerr-Pennington* doctrine from abrogation. The protection of lobbying by private citizens is necessary to preserve the flow of information to state and local government officials and hence to protect their ability to act. To deny such immunity would eliminate from the legislative process significant data currently provided by commercially motivated private parties, thus placing a

substantial burden upon state and local legislators to obtain the information necessary to adopt regulations. Indeed, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr*, 365 U.S. at 137.

For purposes of this case, we need not suggest that all lobbying is protected. As with *Parker* immunity, it would be possible to deny protection to "lobbying" activities that involve otherwise illegal acts. See *Allied Tube*, 108 S.Ct. at 1939 (indicating that misrepresentation to a court or misrepresentation under oath at a legislative committee hearing would not necessarily be entitled to antitrust immunity); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (no immunity if private party engages in illegal bribery to achieve its ends). The denial of *Noerr* immunity in such circumstances would entail less danger than a conspiracy exception because the lines would be drawn not by the Sherman Act, but by laws attuned to First Amendment concerns.

Yet once again, the facts in this case would not fall within such an exception. Neither personal relationships with elected officials nor lawful campaign contributions can conceivably be viewed as corruption of the normal legislative process that would justify application of the antitrust laws to a local political struggle. Similarly, absent a showing of illegality, COA's occasional provision of free or inexpensive billboard space to public officials cannot be the basis for abrogating *Noerr-Pennington* immunity. And if the City Council did indeed decide to favor COA's position before hearing respondent's presentation, the remedy is at the polls, not in the award of treble damages.

There may be much that is distasteful about the reality of interest-group politics, and much reason to hope that individuals will transcend their private interests and

seek instead the public good. But this Court has never sanctioned the restriction of political speech as a method of ensuring that they do so. Certainly, if there is to be regulation of the lobbying process, it ought not to be through imposition of treble-damage Sherman Act liability—especially when that liability is imposed on the basis of a jury's sense of appropriate etiquette in the political arena as measured by a hazy conspiracy standard.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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